

Cable Television Consumer Protection and Competition Act of 1992,
8 FCC Rcd 3359, 3419 n.228 (1993).

TELE-TV agrees with OpTel that these steps to comply with section 628(f)(1) should be supplemented. See Comments of OpTel at 10 (urging expedited review of program access complaints). Although the Commission staff has acted quickly on some program access complaints,¹⁶ the time from the filing of a complaint to its initial disposition (or resolution by settlement or otherwise) often exceeds 8 months and can be more than a year.¹⁷ Routine briefing accounts for less than 2 months of this time.

Congress recognized that, particularly in the case of new entrants, such delays can be tantamount to denying relief:

The bill provides for an expedited administrative remedy The goal of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy, start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit.

S. Rep. No. 92, at 22-23. This is precisely the problem faced by TELE-TV. TELE-TV and its partners plan to roll out their video services in the first markets by the end of 1996. See Clark

¹⁶See, e.g., Corporate Media Partners v. Continental Cablevision, Inc., File No. CSR 4690-P, 1996 FCC LEXIS 3502 (CS Bur. rel. July 3, 1996) (complaint filed Feb. 29, 1996).

¹⁷See, e.g., CAI Wireless Sys., Inc. v. Cablevision Sys., Inc., 11 FCC Rcd 3049 (Mar. 14, 1996) (complaint filed Feb. 1995; withdrawn Feb. 1996); National Rural Telecommunications Cooperative v. EMI Communications Corp., 10 FCC Rcd 9785 (1995) (complaint filed Sept. 1994; settled Aug. 1995); Elec. Plant Bd. v. Turner Cable Network Sales, Inc., 9 FCC Rcd 4855 (1994) (complaint filed Jan. 1994; decision released Sept. 1994).

Decl. ¶ 3. If TELE-TV cannot, within the next few months, obtain rights to regional sports and other critical programming, TELE-TV and its partners will have to make the difficult decision whether to delay introduction of the service, or go ahead at a severe competitive disadvantage. See id. ¶ 7. In either case, competition will have been postponed, just as the cable companies would hope.

The Commission should commence proceedings to establish expedited procedures that reflect the urgency of many program access complaints, as Congress intended in 1992. Appropriate rules might provide, for example, that where no discovery is required (see 47 C.F.R. § 76.1003(g)), a staff determination must be released within 90 days of the deadline for submission of the complainant's reply. If the staff orders discovery, it should do so within 30 days of the filing of the reply and a decision should be released within 60 days of the close of discovery. Appropriate modifications also should be made to the rules governing supplemental briefing (47 C.F.R. § 76.1003(i)) and referral to an administrative law judge (47 C.F.R. § 76.1003(m)).

CONCLUSION

In TELE-TV's experience, discrimination and other exclusionary practices in the provision of programming are the foremost potential barriers to entry into video distribution. Now that Congress has cleared away other structural impediments through the Telecommunications Act of 1996, it is time to finish the work that was begun in the 1992 Cable Act. The Commission

should urge Congress comprehensively to guarantee that MVPDs will be able to obtain programming on fair terms, while taking steps toward that goal that are already within the Commission's power.

Respectfully submitted,



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August 19, 1996

Exhibit A

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	CS Docket No. 96-133
Competition in the Market for the)	
Delivery of Video Programming)	

DECLARATION OF JOHN D. CLARK, JR.

1. I, John D. Clark, Jr., am Executive Vice President for Programming and Distribution Relations for TELE-TV Media L.P. ("TELE-TV"). I am responsible for TELE-TV's program licensing as well as its relationships with program suppliers. Before joining TELE-TV in October 1995, I was the Managing Director and Chief Executive Officer of Telecom Media, which is a subsidiary of Telecom New Zealand. As the head of Telecom Media's video services operations between February 1995 and September 1995, I was responsible for guiding the company's entry into the broadband video business, including licensing video programming.

2. From 1991 to 1995, I served as Senior Vice President for Marketing and Programming of Crown Media, Inc. There, my responsibilities included acquiring programming for the company's cable systems, which had \$400 million in revenues and 950,000 subscribers. Prior to joining Crown Media, I was the Senior Vice President for Marketing and Programming for Cencom Cable Associates. Before that, I served as Vice President for Marketing and Programming for Coaxial Communications. At both of these companies, my responsibilities included the licensing of video programming.

TELE-TV's Acquisition of Video Programming

3. TELE-TV is a limited partnership formed by subsidiaries of Bell Atlantic Corporation, NYNEX Corporation, and Pacific Telesis Group (collectively, "the partners"). TELE-TV is developing nationally branded home entertainment that will be offered over various wired and wireless video distribution systems and networks. As part of that business, TELE-TV is licensing video programming as an agent for the partners and their video services affiliates. The partners are planning to distribute this programming initially over multichannel, multipoint distribution systems (MMDS), and then eventually over the enhanced wireline networks that they are presently developing. Through their affiliates, the partners are scheduled to begin offering service at the end of 1996 or in 1997 in Boston, Los Angeles, New York, Norfolk, and the San Francisco Bay area; service is scheduled to begin in Philadelphia in 1998.

4. The success of the partners' entry into video delivery will depend upon their ability to offer programming that is at least as attractive to viewers as the programming provided by incumbent cable operators. The partners must at a bare minimum offer the popular channels available over cable systems, such as the signals of local affiliates of NBC, CBS, ABC, and Fox; "basic" cable channels like ESPN, CNN, and regional sports networks; and "premium" channels like HBO, Showtime, and Starz!. All this programming, moreover, must be available at a competitive price, or else potential customers will not have a real choice of video distributors.

5. TELE-TV thus has the responsibility of assembling cost-competitive packages of programming that will include (among other things) popular programming demanded by

potential subscribers. Toward that end, TELE-TV has been involved for the past year in the process of securing rights to video programming. While TELE-TV is seeking retransmission rights from a wide range of programmers, including television broadcasters, the focus of this declaration will be on TELE-TV's efforts to obtain programming developed for cable television by programmers affiliated with cable operators.

6. This declaration will give a few examples of instances in which TELE-TV has been unable to obtain this cable programming on non-discriminatory terms. The examples are illustrative: In TELE-TV's experience, the program access rules often are not being respected. Furthermore, the Commission's complaint procedures fail to provide effective relief from the cable industry's unlawful practices. By abusing their control over vital programming, the major cable operators have been able to erect major barriers to entry into video delivery.

TELE-TV's Inability to Obtain Rainbow Programming

7. TELE-TV has had particular difficulty obtaining programming from Rainbow Programming Holdings, Inc. ("Rainbow"), a wholly owned subsidiary of Cablevision Systems Corporation -- one of the nation's largest cable operators. Rainbow is the managing partner of partnerships that control satellite-delivered regional sports programming services such as SportsChannel New York, SportsChannel New England, and SportsChannel Pacific. This popular sports programming is an essential component of TELE-TV's offerings. In some markets, cable subscribers consider regional sports programming as important as the prime-time shows of the major broadcast networks. Unless they can obtain access to Rainbow's regional programming, the partners will either have to postpone the scheduled roll-out of their

services, or if roll-out goes ahead as scheduled, they will be at a severe competitive disadvantage against incumbent cable systems that do offer this Rainbow programming. Thus, as the foremost competitor of the partners' video operations in a number of markets, Cablevision has a clear interest in seeing that TELE-TV does not gain access to Rainbow's programming.

8. Rainbow's strategy of delay and discrimination in dealing with TELE-TV suggests that it is driven by that interest. Rainbow's initial tactic in dealing with TELE-TV was an outright refusal to sell its sports programming. The standard industry practice in licensing video programming is as follows. First, a distributor that seeks rights to distribute programming contacts the vendor to begin discussions. Early in the negotiations, the vendor furnishes a "rate card" (i.e., a schedule of the rates at which it licenses programming) and draft affiliation agreement (i.e., a form licensing contract). Using the rate card and draft agreement as a basis for discussions, the parties negotiate the precise terms and conditions of the licensing arrangement. In my prior experience with Crown Media and Cencom Cable, Rainbow conformed to this standard industry practice. Yet Rainbow has taken a very different course with respect to TELE-TV.

9. In a series of telephone calls and a letter to Rainbow's Chief Executive Officer, I sought in November and December of 1995 to begin discussions on the licensing of Rainbow programming services by TELE-TV. After Rainbow failed to answer all of these inquiries, I sent a second letter dated February 5, 1996, in which I specifically asked that Rainbow provide its draft affiliation agreements, so that negotiations could move forward.

10. On February 12, I received a letter from Rainbow's Vice President for Business Affairs, Andrea Greenberg. Ms. Greenberg claimed that Rainbow had no record of my communications before the February 5 letter. She ignored my request for draft affiliation agreements and instead submitted a laundry list of questions, some of which involved irrelevant and/or highly proprietary matters, such as TELE-TV's roll-out schedule, subscriber projections, and proposed service offerings. Ms. Greenberg indicated that discussions could go forward only after TELE-TV divulged the information.

11. As explained above, Rainbow's demands represented a dramatic departure from programming vendors' normal practices. Information of the sort sought by Rainbow is provided, if at all, during the course of negotiations, and not as a condition for commencing negotiations. Because Rainbow holds the key to the regional sports programming that TELE-TV needs, however, I had no alternative other than to answer Rainbow's questions. In doing so, I repeated my request that Rainbow furnish TELE-TV with rate cards and draft affiliation agreements. Rainbow once again failed to respond, and Ms. Greenberg did not return my subsequent telephone call.

12. Being unable even to get a response from Rainbow, on May 1 I notified Rainbow and Cablevision that TELE-TV and the partners' video services affiliates intended to file a program access complaint based on Rainbow's refusal to negotiate to sell its programming. Ms. Greenberg responded with yet another request for information from TELE-TV, covering the same issues already addressed in my prior letter. So that Rainbow would not have any excuse for further obfuscation, I again answered Ms. Greenberg's questions at length, but I reiterated that TELE-TV would file a program access complaint with

the Commission if Rainbow failed to provide a copy of Rainbow's standard affiliation agreement and rate card.

13. At this point, nearly six months after TELE-TV first asked to begin negotiations, Rainbow agreed to meet with TELE-TV and provided form affiliation agreements. But that was not the end of Rainbow's discrimination. During a meeting held at the end of May, Rainbow unveiled its proposed rates for the sports services sought by TELE-TV. Rainbow's rate schedule imposed a fee based on the number of homes passed by the distributor, in addition to a per-subscriber fee. This rate structure clearly disadvantages new entrants who have low subscriber penetrations. By contrast, incumbent cable operators who have high penetration rates pay less per subscriber, further solidifying their market position.

14. Although Rainbow said it was phasing-in this new rate structure for all new programming contracts on a non-discriminatory basis, it apparently calculated customized rates for TELE-TV. Under those rates, TELE-TV would pay up to twice what the incumbent cable operator would pay. Rainbow offered no legitimate business justification for this price penalty; in particular, it was unable to explain how a charge based on the number of homes passed by a distribution network relates to either "differences in [Rainbow's] cost of creation, sale, delivery, or transmission of . . . programming" or Rainbow's "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 C.F.R. § 76.1002(b)(2), (3).

15. Thus, after eight months of trying to obtain rights to Rainbow programming, TELE-TV is again faced with outright discrimination. But, at this point, it seems unlikely that the Commission would act on a program access complaint before the partners' expected

roll-out of TELE-TV's service. TELE-TV thus may have to sign a contract on Rainbow's terms, and then seek relief from the Commission.

16. In short, TELE-TV has been unable to obtain timely access to Rainbow's programming on the terms required under the Cable Act of 1992 and the Commission's rules. Rainbow has pushed each unlawful practice just to the point of a program access complaint, and then begun the process anew with a different violation. If it continues, this gaming of the system will seriously affect TELE-TV's ability to assemble a package of programming that will offer a viable alternative to cable.

TELE-TV's Inability to Obtain Prime Sports West Programming

17. Rainbow is not the only cable-affiliated programming provider that is trying to circumvent the Commission's program access rules. For instance, TELE-TV has been unable to obtain the regional sports programming of Prime Sports West, a satellite-delivered regional sports network that has rights to, among other events, Los Angeles Lakers basketball games and Los Angeles Kings hockey games. Prime Sports West is affiliated with Tele-Communications, Inc. ("TCI"), a major multiple system cable operator. In concert with two other cable MSOs, Prime Sports West has denied TELE-TV programming that must be made available under the existing program access rules.

18. TELE-TV has been seeking rights to carry Prime Sports West's programming in Southern California since January 1996. In early discussions, Prime Sports West told TELE-TV that it was unable to provide its programming in areas served by the cable operators Century Communications Corporation ("Century") and Continental Cablevision

("Continental"), because these cable operators have exclusive rights to distribute Prime Sports West. While Prime Sports West said that it would be willing to sell its programming absent these exclusive arrangements, it told TELE-TV that in order to obtain rights to Prime Sports West, TELE-TV would have to go to Century and Continental.

19. Based upon Prime Sports West's representations, I contacted both Century and Continental on April 16 to request that they provide Prime Sports West programming to TELE-TV. Pursuant to section 76.1002(c)(3) of the Commission's rules, I asked that the cable operators either indicate within 15 days their willingness to sell the programming to TELE-TV, or else allow TELE-TV to negotiate directly with Prime Sports West. I further asked that, if Century or Continental believed they were not subject to the requirements of the program access rules, they provide copies of any contracts or other materials that would support that conclusion.

20. On May 10 (well after the Commission's 15-day deadline for such responses), Century responded that it would need further information about TELE-TV in order to comply with TELE-TV's request under the program access rules. I answered on May 24, providing details regarding TELE-TV's and Pacific Telesis's contemplated operations in California and again requesting that Century provide a rate card and draft affiliation agreement for Prime Sports West programming. Century then asserted that it had a valid, grandfathered subdistribution agreement with Prime Sports West and asked for still more information from TELE-TV as a precondition to selling the programming..

21. In mid-July, Century provided the supposed support for its claim of a grandfathered exclusive subdistribution agreement. This proved to be a contract entered into

on October 1, 1991-- too late to qualify as a grandfathered agreement under section 76.1002(e) of the Commission's rules.

22. TELE-TV nevertheless provided Century with the further information it had requested on July 19. Century, however, still did not respond to TELE-TV's request to begin negotiations, nor did Century allow TELE-TV to buy directly from Prime Sports West or show why it was not required to do so.

23. Because Century was unable to produce any evidence of a valid subdistribution agreement yet would not make Prime Sports West programming available to TELE-TV, and because Prime Sports West refused to sell its programming directly to TELE-TV, TELE-TV gave Century and Prime Sports West notice that TELE-TV and Pacific Bell Video Services would file a program access complaint. Century and Prime Sports West received that notice on August 13, yet neither company has come forward with any proof of a grandfathered exclusive agreement, or with an offer to sell Prime Sports West programming. While TELE-TV remains anxious to reach a negotiated agreement regarding access to Prime Sports West programming, it will file a program access complaint with the Commission if Century and Prime Sports West continue to stonewall.

24. TELE-TV has run into similar problems in its dealings with Continental. Continental responded to my request for distribution rights to Prime Sports West by asserting that it had "long-standing exclusive rights to distribute Prime Sports" in its service territory, but would consider selling to TELE-TV. In support of its claim of a valid exclusive subdistribution arrangement, Continental produced only a press released from 1989, which merely reflected that Continental was an early affiliate of Prime Sports.

25. Because Continental had not substantiated its claim of a grandfathered exclusive subdistribution agreement, I asked for copies of contracts that would prove Continental's claim. When Continental did not respond to that request, I asked that Prime Sports West intervene to make the programming available, which it refused to do.

26. TELE-TV is negotiating with Continental in an effort to obtain rights to Prime Sports West in its territory. But if Continental ultimately refuses to sell to TELE-TV, TELE-TV will be forced to invoke the Commission's program access procedures and file a complaint.

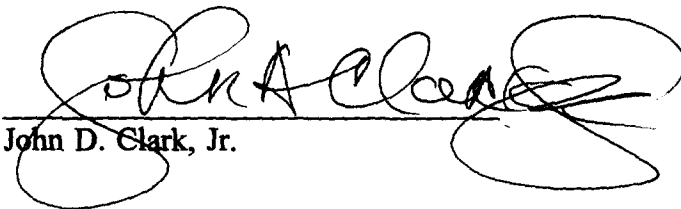
Conclusion

27. TELE-TV's experiences indicate that the Commission's program access rules have not been effective in forcing cable-affiliated programmers to sell their programming, on non-discriminatory terms and without unreasonable delay, to video distributors who would compete against cable. To the contrary, these programmers have used a variety of unlawful tactics to delay TELE-TV's access to their programming.

28. From TELE-TV's perspective, changes in enforcement of the program access rules are required. Processing of program access complaints should be speeded so that timely relief is available and the penalties for non-compliance should be increased to encourage the cable industry to follow the rules. In particular, the costs of delaying a competitor's ability to provide programming should be borne by the programmer that violates the rules, not the distributor that was wrongfully denied access to programming. Cable-affiliated programmers

evidently will not follow the law as long as they, and their cable operator affiliates, can block competitors' entry into video delivery at virtually no cost to themselves.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 1996.



John D. Clark, Jr.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	CS Docket No. 96-133
Competition in the Market for the)	
Delivery of Video Programming)	

DECLARATION OF MINDY S. HERMAN

1. I, Mindy S. Herman, am Senior Vice President -- Business Operations for TELE-TV Media L.P. ("TELE-TV"). My duties at TELE-TV include negotiating retransmission consent agreements with television broadcasters, by which TELE-TV obtains rights to retransmit the broadcasters' programming. Prior to joining TELE-TV in November 1995, I was Senior Vice President, Business Affairs for Fox Television, where I was responsible for, among other things, negotiating all retransmission consent agreements between Fox-owned and -affiliated stations and cable operators. I also was responsible for negotiating licensing agreements with cable operators that carried Fox's fX and fXM cable programming channels.

2. In this affidavit, I will discuss TELE-TV's efforts to obtain rights to the broadcast and cable programming of major broadcast television networks. TELE-TV's ability to assemble a package of video programming that viewers will buy depends upon the acquisition of rights to retransmit this programming, and especially the networks' broadcast signals. If TELE-TV cannot offer prime-time network shows, major events to which

broadcast networks have exclusive rights (such as the Olympics, the World Series, and the Superbowl), or the local news broadcasts of network affiliates, viewers will stay with cable.

3. Likewise, TELE-TV must be able to get the rights to network programming at a reasonable cost. The cost of acquiring network programming will be a significant portion of the total cost of presenting TELE-TV's programming service. If TELE-TV has to pay substantially more than competing cable operators for this programming, viewers will have to pay more for TELE-TV's video service than for a comparable cable service.

4. TELE-TV has made clear to broadcasters from the outset that it is not seeking preferential treatment; TELE-TV seeks only the right to buy programming on terms equivalent to those provided to the cable industry. Yet because of TELE-TV's position as a new entrant whose programming will be presented over new delivery platforms (MMDS and telephone company wireline distribution systems), TELE-TV has been subjected to a number of unreasonable demands by broadcasters that are not made of similarly situated cable operators. In this affidavit I will discuss generally the practices TELE-TV has encountered. Because of the sensitivity of ongoing negotiations over retransmission consent and the possibility that TELE-TV might face retaliation or otherwise be prejudiced in those negotiations, however, I will not discuss the course of TELE-TV's dealings with individual broadcasters, nor will I give details about the specific demands made by each broadcaster. It also should be pointed out that TELE-TV is continuing its efforts to negotiate non-discriminatory arrangements with broadcasters. There has already been progress in those negotiations, and TELE-TV continues to hope that all the networks will back away from their unreasonable demands.

5. One practice encountered by TELE-TV is a failure to deal with TELE-TV in a timely fashion. A major network, for example, refused for many months even to specify its rate for broadcast retransmission rights. Whatever the reason for such delay, it is particularly damaging for new entrants such as TELE-TV, who cannot introduce their services until they have a viable programming line-up in place.

6. When broadcasters have come to the table, they have made extraordinary demands for retransmission fees. Major networks have suggested that TELE-TV should pay a significant "new entrant premium" that would bring the cost of broadcast retransmission rights to multiples of what similarly situated cable operators pay. Such proposals would make it virtually impossible for TELE-TV to compete with cable operators on price.

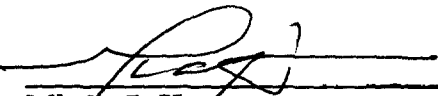
7. While cable operators often are able to avoid paying a retransmission fee by carrying cable channels owned by the broadcaster, TELE-TV has suffered discrimination in this area as well. TELE-TV is being offered the chaff of network-affiliated cable channels while cable operators are given the wheat. Broadcast networks have denied TELE-TV access to relatively desirable cable programming -- such as FX and MSNBC -- that they offer to cable systems as part of retransmission consent agreements. These valuable channels are being provided on an exclusive basis to cable operators with whom TELE-TV competes. TELE-TV has not been given the opportunity to bid for exclusive rights to these desirable channels. Instead, networks have offered TELE-TV less attractive channels in which the networks are investing only a small fraction of the resources they are devoting to "cable exclusive" channels. The networks have even sought agreements under which TELE-TV -- as a condition of obtaining rights to broadcast programming -- would have to set aside multiple

additional channels for programming the networks plan to introduce in the future. Again, this is a dramatic departure from broadcasters' retransmission arrangements with cable operators, which typically provide that the cable operator will carry one additional cable channel that is identified in advance.

8. The "new entrant premiums" proposed by the major networks also involve unconventional types of compensation. These include an insistence that TELE-TV, as a condition of retransmission consent, participate in vaguely defined joint ventures or pay rates for additional cable channels that are substantially more than the rates charged to even the smallest cable operators, as well as proposals that would require TELE-TV to alter its proprietary subscriber services or system architecture to benefit a particular broadcaster or its affiliates.

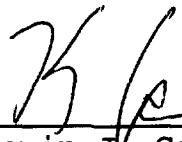
9. Because it will be a new entrant into video delivery, TELE-TV -- unlike cable operators -- does not have control over millions of subscriber "eyeballs" that can be used as leverage against such demands. TELE-TV is not seeking any special treatment from the networks, but only wants to obtain rights to critical broadcast programming on the same terms as would be available to a similarly situated cable operator. Unless TELE-TV can receive this fair treatment in its retransmission consent negotiations, TELE-TV and its partners will face a significant competitive disadvantage as compared to the entrenched cable operators.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
August 16, 1996.


Mindy S. Herman

CERTIFICATE OF SERVICE

I, Kevin J. Cameron, hereby certify that on this 19th day of August, 1996, copies of the Reply Comments of Tele-TV were served upon the parties listed on the attached service list by first-class mail, postage prepaid.



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